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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 287.

THE UNITED STATES OF AMERICA,
Appellant,

v.

THE PENNSYLVANIA RAILROAD COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

MEMORANDUM

In re STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

CHARLES MYERS,
FRANCIS BIDDLE,
JOHN DICKINSON,
FREDERIC D. McKENNEY,
Counsel for Appellee.

SEPTEMBER 20, 1938.

ALLEN, LANE & SCOTT, PRS., PHILADELPHIA.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 287.

The United States of America,

Appellant,

v.

The Pennsylvania Railroad Company.

PPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

MEMORANDUM

re STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

The fifth numbered point in appellee's "Statement pposing Jurisdiction and Motion to Dismiss or

Affirm" in the above entitled cause has apparently not been fully apprehended by counsel for the United States. See Brief for the United States in Opposition to Appellee's Motion to Dismiss or Affirm, page 12. The point in question is as follows:

> "The decision of the District Court of June 16, 1938, sustaining the demurrer, is not based on the invalidity or construction of the statute upon which the indictment is founded, as required by the Criminal Appeals Act of March 2, 1907, Chapter 2564, 34 Stat. 1246, Title 18, Section 682 of the United States Code Annotated."

Therefore, in order that the significance of the point may not be neglected, and in order that this Court may adequately have the point before it in passing upon the question of jurisdiction, appellee respectfully submits this supplemental memorandum:

The right of the United States to take this appeal *directly* to this Court from the District Court, if such a right exists, must be derived from the second paragraph of Section 682 of Title 18 of the United States Code, which provides that the United States may take such a direct appeal,

> "From a decision or judgment quashing, setting aside or sustaining a demurrer to any indictment for any count thereof where such decision or judgment is based upon the invalidity or construction of *the statute upon which the indictment is founded.*"

In other words, where the decision below went upon a point of statutory construction, which constitutes the issue in the appellate proceeding, the construction must go to the statutory basis of the indictment, *i. e.* to the statute which creates the offense charged, if this Court is to have jurisdiction of a *direct* appeal from the District Court.

In the instant case, the District Court sustained the demurrer by reason of its construction of that part of the so-called Elkins Act (United States Code, Title 49, Section 41) which relates to the venue of proceedings for the prosecution of violations of the Act. Surely an indictment cannot be said to be "founded" on a statutory provision which merely lays the venue of proceedings to enforce the penalty for the offense charged. Such a provision is purely procedural, and does not create the offense or have any reference to the nature and elements of the offense as created by the statute. Obviously the purpose of Section 682 of Title 18 is to make available to the public, by securing the prompt interpretation of this Court, information as to what does and what does not constitute an offense under the statute. That purpose would seem to be self-evident from the use of the phrase "upon which the indictment is founded." All of the decisions in which a direct appeal under the second paragraph of Section 682 have been entertained by this Court have, so far as appellee has been able to discover, been of this character,—*i. e.* cases where the issue is as to what constitutes an offense under the statute and in which it is accordingly necessary to construe the

language of the statute creating the offense in order to determine whether or not the indictment is demurrable.

United States v. *Sutton*, 215 U. S. 291;
United States v. *Heinze*, 218 U. S. 532;
United States v. *Patten*, 226 U. S. 525;
United States v. *Birdsall*, 233 U. S. 223;
United States v. *Foster*, 233 U. S. 515;
United States v. *Nixon*, 235 U. S. 231;
United States v. *New South Farm and Home Company*, 241 U. S. 64.

The only basis for treating the venue provision here in issue as "the statute on which the indictment is founded" is that it occurs within the four corners of the same "act" as the provision creating the offense. Certainly it would not seem to be in accordance with sound construction to interpret the pertinent provision of Section 682 as opening the door to a direct appeal on the construction of any or all provisions which Congress may for one reason or another have seen fit to include within the same legislative enactment which creates the offense. The word statute means something different from "act." By a classic definition, statutes are,

> "those rules of conduct which are introduced by the law-making power in an express and positive form; which control the particular cases and circumstances to which they relate or describe, and which are called statutes, made by legislation."
>
> Dwarris, Statutes (Potter's Edition, 1871), page 38.

In other words, the "statute" is the *rule of conduct*, not the particular combination of written or printed pages which the legislature happened to enact as a single "act." The rule of which the construction will bring a case to this Court by *direct* appeal is the rule "on which the indictment is founded." That rule consists of the statutory provision or provisions creating the offense and does not consist of another and separate procedural rule which lays the venue. It seems obvious that if the venue provision, the construction of which is in issue, were contained in a statute other than the Elkins Act there would be no ground whatever for the contention that such a statute was "the statute on which the indictment is founded." The fact that the venue provision happens to have been included by Congress within the four corners of the Elkins Act should make no difference.

Since the only point of statutory construction involved in this case is the construction of the provision laying the venue, appellee respectfully submits that this Court is without jurisdiction under Section 682 of Title 18 to entertain this direct appeal.

Respectfully submitted,

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SEPTEMBER 20, 1938.